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Attorneys for the Fund Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
RICHARD ELLO,

Plaintiff,

v.

ISHRY SINGH, et al.,

Defendants.
-----X

Case No. 05 CV 9625 (RJS)

**DECLARATION OF
DEIDRE A. GROSSMAN**

DEIDRE A. GROSSMAN declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the following is true and correct:

1. I am an associate at the law firm of Proskauer Rose LLP, counsel to Defendants Ishry Singh, Laborers-Employers Cooperation and Education Trust Fund, Mason Tenders' District Council Trust Funds ("MTDC Funds"), Raymond Pocino, as a Trustee of the MTDC Funds, and John Virga, MTDC Funds' Director (collectively, the "Fund Defendants") in the above-captioned action.

2. I submit this declaration in support of the Fund Defendants' Motion to Dismiss.

3. I affirm that attached hereto as Exhibit A is a copy of the relevant pages of the transcript from the January 5, 2006 Court conference in this case, which are cited in the Fund Defendants' accompanying Memorandum of Law.

4. I affirm that attached hereto as Exhibit B is a copy of the relevant pages of the transcript from the September 12, 2006 Court conference in this case, which are cited in the Fund Defendants' accompanying Memorandum of Law.

5. I affirm that attached hereto as Exhibit C is a copy of the relevant pages of the transcript from the December 12, 2006 Court conference in this case, which are cited in the Fund Defendants' accompanying Memorandum of Law.

Dated: New York, New York
May 28, 2008


DEIDRE A. GROSSMAN

Grossman Decl., Ex. A

615YELLC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 RICHARD ELLO,

4 Plaintiff,

5 v.

05 Civil 9628 (KMK)

6 ISHRI SINGH, et al.,,

7 Defendants.

8 -----x

New York, N.Y.
January 5, 2006
2:30 p.m.

9
10 Before:

11 HON. KENNETH M. KARAS,

12 District Judge

13 APPEARANCES

14
15 POLLACK & KOTLER,
Attorneys for Plaintiff
16 RUTH M. POLLACK, ESQ.,

17 PROSKAUER ROSE, LLP
Attorneys for Defendants Ishri Singh, et al.,
18 KATHLEEN M. McKENNA, ESQ.,
DEIDRE A. GROSSMAN, ESQ.,
19

20 CURTIS, MALLET, PREVOST, COLT & MOSLE, LLP
Attorneys for Defendant Richard Pocino
SAMUEL ROSENTHAL, ESQ.,
21

22 LANKFORD, COFFIELD & REED, PLLC,
Attorney for Defendant Richard Pocino
120 North Saint Asaph Street
23 Alexandria, Virginia,
TERRANCE G. REED, ESQ.,
24
25

615YELLC

1 an opportunity to speak to anyone because my client was cut off
2 from trustees' meetings and so forth, but he is of the
3 understanding that a number of the remarks were made about him
4 among the trustees and he was left out of meetings that he was
5 supposed to attend to and be a part of.

6 THE COURT: Look, it seems to me --

7 MR. POLLACK: I can certainly do this.

8 THE COURT: When you will amend this, the second page
9 of the letter submitted on behalf of Pocino and LIUNA, you see
10 the elements that you have to allege. They are there in black
11 and white.

12 MR. POLLACK: I just got their letter I believe the
13 day before yesterday. I certainly agree with you, Judge.

14 THE COURT: My point is before you bring a federal
15 lawsuit and you make allegations as serious as these -- and I'm
16 not saying you can or can't prove them, I'm saying before you
17 do that you have the facts which have to be specific, like who
18 the state actor is when you bring a due process in, and what
19 you have to establish to make out a cause of action, what the
20 elements are, and it seems in a number of instances that has
21 not been done.

22 What about the point that is made on behalf of Lecet
23 regarding your wrongful termination cause of action?

24 New York does not recognize a cause of action for
25 wrongful termination.

615YELLC

1 MR. POLLACK: Judge, what does that mean?

2 THE COURT: It means that New York doesn't recognize
3 it as a cause of action. I'm not sure --

4 MR. POLLACK: Well, that is sort of yes, it's true and
5 no, it's not. It is -- it does recognize a wrongful
6 termination if it is unconstitutional or legal grounds.

7 THE COURT: What is the unconstitutional grounds upon
8 which your client was terminated?

9 MR. POLLACK: Whistle blower is first of all an
10 ERISA --

11 THE COURT: Is that constitutional or statutory?

12 It haven't checked LEXIS overnight, but I don't think
13 there is an ERISA amendment to the state constitution.

14 MR. POLLACK: No, but there may be both a Section 5 --
15 I know there is a 510 claim --

16 THE COURT: Which is a statutory claim.

17 MR. POLLACK: Correct. But there may also be a First
18 Amendment claim here in terms of what he states or what he does
19 that he is being punished for.

20 THE COURT: Let's break that down. 510 claim is an
21 ERISA claim, not a state cause action. To the extent you are
22 alleging some type of common law equivalent, why wouldn't ERISA
23 at least preempt that allegedly equivalent state law action?

24 MR. POLLACK: Why would it not?

25 THE COURT: Yes.

615YELLC

1 example, is going to have, in my view, conflicts with other
2 people currently represented by Proskauer, for example, and at
3 some point I believe that everybody is going to be getting
4 their own horses, changing horses at some point in time and not
5 only have new attorneys but have to have separate attorneys
6 because of conflicts. To me I can see right away there exists
7 between the various entities and Mr. Singh, for example.

8 I don't know how they could possibly represent all
9 these entities and Mr. Singh unless they have some reason why
10 to hang on to Mr. Singh , but I see that as potential problem
11 down the road.

12 THE COURT: That is a hearing problem. I agree with
13 you, by the way, I think there are some potential conflicts
14 there, but they are only potential at this point.

15 It seems to me, I am addressing everybody here now, it
16 makes sense for the conflict issue to get resolved quickly. If
17 there is a conflict, let's get new lawyers, if not let's know
18 that based on the facts as they exist at the time we make the
19 decision here.

20 But at the same time, I am talking about amending the
21 complaint. Since there is no complaint, you get one bite at
22 the apple, but let's get that bite taken, because regardless of
23 what I do with the conflict issue, presumably new counsel will
24 pick up this ball and press forward on the various grounds to
25 dismiss all or parts of the complaint and it seems to me that

Grossman Decl., Ex. B

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x
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3 RICHARD ELLO,
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4 Plaintiff, New York, N.Y.
4
5 v. 05 Civ. 9625 (KMK)
5
6 ISHRI SINGH, et al., ,
6
7 Defendants.
7
8 -----x
8
9 September 12, 2006
9 10:55 a.m.
10
10 Before:
11
11 HON. KENNETH M. KARAS,
12
12 District Judge
13
13 APPEARANCES
14
14 RUTH MARIE POLLACK
15 Attorney for Plaintiff
15
16 PROSKAUER ROSE LLP
16 Attorneys for Fund Defendants
17 BY: KATHLEEN M. McKENNA
17 DEIDRE ANN GROSSMAN
18
18 CURTIS MALLETT-PREVOST COLT & MOSLE
19 Attorneys for Defendants Porcino and Laborers
19 International Union of North America
20 BY: SAMUEL ROSENTHAL
20
21 - and -
21
22 LANKFORD COFFIELD & REED
22 Attorneys for Defendants Porcino and Laborers
23 International Union of North America
23 BY: TERRANCE REED
24
25
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1 summons is now going to include additional parties.

2 The other item is that, in response to questions that
3 have been raised in the past in letters, I am withdrawing my
4 first proposed second amended complaint because it was
5 defective and I am also seeking to withdraw the affidavit of
6 Wendy Brower as being not necessary.

7 THE COURT: All right. We'll get to the Brower
8 affidavit in a second.

9 MS. POLLACK: Yes, your Honor.

10 THE COURT: The difficulty here with the complaint is
11 that it really is the quintessential moving target.

12 Your initial complaint had some deficiencies in it.
13 Obviously defendants highlighted those. In response to that I
14 gave you your one Rule 15(a) bite of the apple on the eve of or
15 even the morning of -- because ECF reflects, I think, a 12:15
16 a.m. filing -- argument on your motion to disqualify Proskauer
17 and Curtis Mallet. This is the proposed second amended
18 complaint, which is quite lengthy, which as you know was
19 dismissed for very serious technical deficiencies, that is,
20 that there was a motion, and you did not comply with my rule,
21 which is a very common rule, that you seek leave to file such a
22 motion. But then, when the defense pointed out more glaring
23 deficiencies, in particular, with the RICO causes of action,
24 now I guess we are going to get another proposed second amended
25 complaint.

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1 are going to have to show when they were ascertained, when they
2 were learned. Putting that to the side, any new facts, this is
3 going to be it? Can I assume that?

4 MS. POLLACK: This is going to be -- it actually is in
5 existence, the complaint which I believe based on my
6 investigation and new information that's come to my attention,
7 both through counsel's letters and through my own
8 investigation, developing facts, it will and it does contain
9 the essential elements of a RICO complaint.

10 THE COURT: That is not my question.

11 MS. POLLACK: Well, it is the complaint that I intend
12 to file which will permit us to go forward into the merits of
13 the case. I hope that answers the question, your Honor.

14 THE COURT: So let me just make it crystal clear.

15 MS. POLLACK: Yes.

16 THE COURT: Unless there are new facts that you
17 learned and you can prove when you learned them, is this the
18 complaint you intend to go to trial on?

19 MS. POLLACK: Well, of course, unless there are new
20 facts that come to my attention.

21 THE COURT: This is a very simple question. Unless
22 there are facts that you learn and you can prove that you
23 learned them after you filed this amended complaint, can I
24 assume this is the complaint you will go to trial on?

25 MS. POLLACK: I have never been asked that question

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1 before. Let me think about that. I think it's safe to assume
2 that this will be the basis -- this will be the complaint I go
3 to trial on, unless we discover something during discovery,
4 which is very likely here, which will add to the complaint.

5 THE COURT: My point is, when you go ahead and you
6 finalize this new second amended complaint --

7 MS. POLLACK: Yes.

8 THE COURT: -- that's what's going to be in play, and
9 that's what the defendants are going to say should not be done,
10 presumably on futility grounds, among other reasons. What I
11 think they are entitled to, particularly given the history of
12 this case, is to know that their efforts are not going to be a
13 waste of time.

14 I don't want a third amended complaint that is based
15 on facts that were available to you at the time you filed the
16 second amended complaint. There's no more moving targets. I
17 recognize that there may be new facts. Assuming you can prove
18 to me that they were new facts, then that's a different story.

19 MS. POLLACK: Sure.

20 THE COURT: What I am concerned about is the rather
21 troubling timing of the initial second amended complaint on the
22 eve of argument on your motion to disqualify counsel. I just
23 find that to be a rather extraordinary coincidence. Fine. Be
24 that as it may, I just want to make sure we are not all wasting
25 our time on a complaint you don't intend to go to trial on,

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1 that you intend to keep amending as they keep shooting down
2 your allegations in premotion letters and you keep then
3 changing the complaint. We can't have that. That's my only
4 point.

5 MS. POLLACK: I understand that, and I respect that.

6 THE COURT: All right.

7 MS. POLLACK: I don't take any of this lightly.

8 THE COURT: OK.

9 MS. POLLACK: This is going to be the complaint that
10 we can count on here.

11 It will contain allegations that I have facts to
12 substantiate as per Judge Sweet's opinions that regard RICO
13 complaints and how sufficient they must be.

14 THE COURT: OK. You have pleading issues you have to
15 address. You have very serious pattern issues you are going to
16 have to address. You have racketeering issues you are going to
17 have to address. There are RICO conspiracy issues you are
18 going to have to address, but you are not going to address them
19 by just continuing to amend. You are going to address them by
20 getting it right now. Then I am going to hear from them and
21 you as to why the amended complaint is or is not futile or any
22 other argument that they make in opposition to your motion.

23 With respect to when you can get this done and when
24 you can get the final second amended proposed complaint done
25 and your motion in support of the amendment, when is it you can

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Grossman Decl., Ex. C

6ccQellC

Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x
3 RICHARD ELLO,

Plaintiff,

v. .

05 CV 9625 (KMK)

4 ISHRI SINGH, In his individual
and official capacities,
5 RAYMOND POCINO, Vice President
and Eastern Regional Manager
6 of Laborers International
Union of North America in his
7 individual and official
capacities, LABORERS
8 INTERNATIONAL UNION OF NORTH
AMERICA, LABORERS EMPLOYERS
9 COOPERATION AND EDUCATION
TRUST FUND, RAYMOND POCINO,
10 Trustee in his Individual and
official capacities, MASON
11 TENDERS DISTRICT TRUST FUNDS,
JOHN VIRGA, Funds Director in
12 his Individual and official
capacities, JOHN DOE A through
13 D; the latter being parties
unknown to plaintiff, JANE DOE
14 A through D; the latter being
parties unknown to plaintiff,
15 Defendants.

-----x

16 New York, N.Y.
17 December 12, 2006
4:00 p.m.

18
19 Before:

20 HON. KENNETH M. KARAS,

21
22 District Judge
23
24
25

6ccQellC

Conference

1 THE COURT: Well, again, you know, Ms. Pollack let's
2 keep our eye on the ball here. I'm interested in the facts,
3 and then we'll apply the law to the facts.

4 MS. POLLACK: No, I'm talking about the facts, Judge.

5 THE COURT: Okay, and I'm talking about the facts that
6 are relevant.

7 MS. POLLACK: Some am I.

8 THE COURT: What's relevant here is that right now
9 there's no malicious prosecution claim at all.

10 MS. POLLACK: As we sit here today.

11 THE COURT: That may change. It may or may not
12 change. Obviously, I understand the facts can change. All
13 right. Thank you, Ms. Pollack.

14 MS. POLLACK: You're welcome.

15 THE COURT: Ms. McKenna, is there anything else new
16 that's happened that you would like to enlighten me about?

17 MS. McKENNA: Not that we know, your Honor. I think,
18 how we came to this juncture to be here today is as of a
19 consequence of the fact that since July, I believe, your Honor,
20 we have been dealing with plaintiff's attempt to amend the
21 complaint. As I counted, your Honor, if we don't count the
22 fact that the original complaint in November of '05 was filed
23 twice, we have had six attempts to amend the complaint. This,
24 despite the fact that in January of '05 as I recall it --

25 THE COURT: Or '06.

6ccQellC

Conference

1 MS. McKENNA: '06, forgive me --

2 THE COURT: Right.

3 MS. McKENNA: -- you indicated to the plaintiff that
4 she would get one bite of the apple. At the risk of being too
5 flip, your Honor, I think she's eaten the whole apple.

6 We had a first amended complaint filed January 25.

7 On July 13 in violation of your individual rule, she
8 prematurely filed a proposed second amended complaint. That
9 got withdrawn.

10 On July 18, plaintiff belatedly complied with the
11 rules and amended the first -- served his first -- amended his
12 first amended complaint.

13 Then on August 5 before you were able to schedule a
14 conference on that one, plaintiff preempted it by asking you to
15 disregard his request because there was going to be yet another
16 request for a pleading; and then there were a series of letters
17 that got us to a conference before you on September 12.

18 You tell the plaintiff at that juncture, okay, is this
19 complaint that you're about to file going to be it? In fact,
20 your Honor, I believe -- I re-read it today, I could be
21 mistaken, there's at least two pages of colloquy on that issue.

22 THE COURT: Yes, there are. I've read them.

23 MS. McKENNA: Plaintiff says yes, and on September 15
24 files a proposed second amended complaint. It is very
25 different from the first amended complaint. I would note that

6ccQellC

Conference

1 despite my demands for it, it does pertain to my client, the
2 district attorney got a copy of it, and I didn't.

3 So, Judge that would be the only concern I have.

4 That's a new evidence issue that I would have to address
5 because Proskauer put that into the mix. When I saw that in
6 their papers, as I saw actually transcripts from the criminal
7 proceeding in their papers, I didn't expect that because I
8 hadn't even gotten the transcripts in the criminal case yet.
9 So that would be the only thing I would do --

10 THE COURT: Am I correct in saying, so we can make
11 sure the record is clear, that what you would like to do --

12 MS. POLLACK: Yes, sir.

13 THE COURT: -- is amend your complaint to include the
14 causes of action that are contained in the September 15
15 complaint as well as the fourth cause of action, the defamation
16 cause of action that is contained in your November 2 filing?

17 MS. POLLACK: Yes, sir.

18 THE COURT: And all that's being withdrawn without
19 prejudice at this point is the malicious prosecution claim?

20 MS. POLLACK: Yes, sir.

21 THE COURT: So Ms. McKenna, I don't know if that
22 answers your question. Would you like to now ask another
23 question?

24 MS. McKENNA: There is another issue. In plaintiff's
25 reply on page 20, plaintiff indicated he's decided not to